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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA
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13 UNITED STATES OF AMERICA,
14 Plaintiff,

NO. CIV S-06-1740 FCD/KJM

15 v.

MEMORANDUM AND ORDER

16 UNION PACIFIC RAILROAD
17 COMPANY,

18 Defendant.
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20 This case arises out of the "Storrie Fire" that occurred on
21 August 17, 2000 and resulted in damages to approximately 52,000
22 acres of National Forest System ("NFS") land in the Plumas and
23 Lassen National Forests before it was suppressed. This matter is
24 before the court on four motions for partial summary judgment,
25 three brought by defendant Union Pacific Railroad Company
26 ("defendant" or "UP") and one brought by plaintiff United States
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1 of America ("plaintiff").¹ In general, the motions ask the court
2 to adjudicate core legal issues regarding the proper measures of
3 alleged natural resource damages in this action and to issue
4 specific orders defining the application of those measures.
5 Because the motions raise overlapping issues, the court considers
6 them jointly herein.²

7 At issue are the following key questions: (1) whether
8 diminution of market value of the subject real property is the
9 proper, over-arching measure of plaintiff's natural resource
10 damages in this case;³ (2) if diminution in market value is not
11 the proper standard, whether plaintiff may recover as separate
12 and distinct injuries alleged timber damages, of over \$121
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15 ¹ UP's motions seek to limit plaintiff's damages recovery
16 and include a motion to determine the proper measure of natural
17 resource damages (Docket #59), the proper measure of natural
18 resource damages for areas subject to special land use
19 restrictions (Docket #70), and habitat equivalency damages
(Docket #68). Plaintiff's motion seeks a ruling regarding a
minimum, pre-fire value of its lost timber and preclusion of UP's
affirmative defense of failure to mitigate damages based on a
theoretical post-fire salvage value for the timber (Docket #58).

20 ² Indeed, UP's motions, Docket #s 59 and 70, are
21 duplicative of one another in many respects. Also, these motions
22 address plaintiff's alleged timber damages, and thus, plaintiff's
23 motion (Docket #58), raising largely the same issues, is properly
24 treated as a cross-motion to UP's motions (Docket #s 59 and 70).
25 In all, UP's motions, including its motion regarding plaintiff's
26 habitat equivalency damages, could have been brought as one
27 consolidated motion, and the court could have treated plaintiff's
28 motion regarding one aspect of its requested damages as a cross-
motion, in part, to UP's motions seeking to limit plaintiff's
overall damages.

29 ³ In arguing in favor of this measure of damages, UP
30 contends that corollary rules require a finding that diminution
31 in market value and cost of restoration are "alternative"
32 measures not additive ones, and the "lesser of" rule limits any
33 natural resource damages to the lesser of diminution in market
34 value or cost of restoration.

1 million, reforestation⁴ costs, between \$24 and \$33 million, and
2 loss of use of non-timber forest services, including loss of
3 habitat and environmental services, during the period of regrowth
4 (the so-called "habitat equivalency" damages), of approximately
5 \$13 million; (3) as to plaintiff's alleged timber damages,
6 whether such damages are recoverable for burned NFS lands located
7 on "deferred" or "offbase" lands under the "Quincy Library Group
8 Act" or located in designated "Wilderness" areas, when certain
9 legal restrictions preclude commercial logging of these lands;
10 (4) if such an award of timber damages is legally permissible,
11 whether defendant is entitled to an offset of such damages based
12 upon the full administrative costs of any such theoretical sale
13 of the timber and for the theoretical salvage value of the
14 timber; (5) as to plaintiff's reforestation costs, whether said
15 costs are unreasonable or too speculative to serve as a basis for
16 a damages award; and (6) as to plaintiff's habitat equivalency
17 damages, whether said damages are duplicative or unauthorized and
18 thus excludable from any damages award.

19 For the reasons set forth below, defendant's motions are
20 DENIED and plaintiff's motion is GRANTED in part and DENIED in
21 part.⁵ The court finds that diminution in market value is not
22 the proper measure of damages in this case. Plaintiff may
23

24 ⁴ The measure of "restoration" used by plaintiff in the
25 case of the Storrie Fire is "reforestation," or replanting of the
26 forest, in areas severely damaged by the fire. For purposes of
this order, the terms restoration and reforestation are used
interchangeably.

27 ⁵ Because oral argument will not be of material
28 assistance, the court orders these matters submitted on the
briefs. E.D. Cal. L.R. 78-230(h).

1 recover damages for its separate injuries to the trees, to the
2 soil and pre-merchantable timber, and its loss of use of habitat
3 and environmental services during the period of forest regrowth.
4 Defendant will not be permitted to argue at trial that
5 plaintiff's requested timber damages, which amount is in dispute,
6 are inflated due to a failure to consider certain administrative
7 costs, and it will not be permitted an offset, pursuant to its
8 affirmative defense of failure to mitigate damages, based on the
9 theoretical salvage value of the timber. Plaintiff's
10 reforestation costs are recoverable, in addition to the other
11 requested damages, and are not unreasonable or too speculative.
12 And finally, plaintiff's habitat equivalency damages are legally
13 permissible and separately compensable from the other requested
14 damages.

15 BACKGROUND⁶

16 The Storrie Fire ignited on August 17, 2000 on NFS lands in
17 Plumas County, California. (T-RUF ¶ 1.)⁷ As addressed in
18 plaintiff's separate motion for summary adjudication on liability
19 issues, plaintiff contends a UP work crew ignited the fire while
20 repairing a rail at the origin area of the Storrie Fire, and UP
21 and its crew breached the standard of care in conducting the

22 ⁶ Unless otherwise noted, the facts recited herein are
23 undisputed. As reflected in the parties' various responses to
24 each other's statements of undisputed facts and additional
25 undisputed facts, there are a number of factual disputes between
26 them. However, these disputes are not material to resolution of
the motions, which raise solely legal issues pertaining to the
appropriate measures of damages in this case, and thus, the court
does not recount those facts herein.

27 ⁷ "T-RUF" refers to UP's response to plaintiff's
28 statement of undisputed facts filed in support of its motion for
partial summary judgment re: timber damages (Docket #82).

1 repair and in failing to monitor and suppress the fire before
2 leaving the scene.⁸ Plaintiff asserts it sustained a range of
3 damages as a result of the fire, including fire suppression
4 costs, resource damages and rehabilitation costs. The latter two
5 types of damages are the subject of the instant motions.⁹

6 The Storrie Fire area encompassed over 51,000 acres of NFS
7 lands, with trees destroyed on approximately 21,000 acres in the
8 Plumas and Lassen National Forests. (NR-RAF ¶ 1; NR-RUF ¶ 1.)¹⁰
9 Most of the NFS trees killed in the Storrie Fire, or likely to
10 die because of the fire damage, were located on NFS lands
11 designated as "deferred" or "offbase" for purposes of the Herger-
12 Feinstein Quincy Library Group Forest Recovery Act of 1998
13 ("Quincy Library Group Act") (sometimes referred to herein as
14 "QLG offbase lands"). (T-RUF ¶ 3.) Trees were also destroyed on
15 another portion of the land damaged in the fire known as the
16 "Bucks Lake Wilderness," designated as "Wilderness" under the
17 California Wilderness Act of 1984 and protected under the federal

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19
20 ⁸ In light of defendant's Notice of Concession of
21 Liability, filed Jan. 31, 2008 (Docket #98), the court GRANTS
22 plaintiff's motion on liability issues (Docket #64). As conceded
23 by plaintiff, the reasonableness of and plaintiff's entitlement
24 to the amount of the fire suppression costs as claimed will be
25 determined at trial. (See Docket #88, at 7.)

26 ⁹ The motions do not address other contested measures of
27 damage, such as fire suppression costs, claimed by plaintiff in
28 the amount of more than \$22 million.

29 ¹⁰ "NR-RAF" refers to UP's corrected response to
30 plaintiff's additional facts filed in support of plaintiff's
31 opposition to UP's motion for partial summary judgment re:
32 natural resource damages (Docket #97-2); "NR-RUF" refers to UP's
33 response to plaintiff's opposition to UP's statement of
34 undisputed facts filed in support of UP's motion for partial
35 summary judgment re: natural resource damages (Docket #92-2).

1 Wilderness Act of 1964. (SA-RUF ¶s 20-21.)¹¹ Also damaged in
2 the fire were trees located on areas designated General Forest
3 areas. (SA-RUF ¶ 18.) Overall, less than 1% of the NFS lands
4 within the Storrie Fire perimeter were designated forest land
5 that was unsuitable for timber production. (SA-RUF ¶ 17.)¹²

6 Plaintiff maintains that the Storrie Fire was predominately
7 a moderate to high intensity burn. As a high intensity burn,
8 plaintiff contends, the fire burned the soil cover so the soil
9 itself eroded, and the needles burned off the trees so that there
10 will not be any future duff to become soil. (NR-RAF ¶s 8, 9,
11 10.) In addition to this damage, plaintiff asserts the fire also
12 had a major impact on wildlife habitats and the environment,
13 destroying, among other areas, vast acres of spotted owl habitat
14 and carnivore habitat, as well as an uncounted number of animals.

15
16 ¹¹ "SA-RUF" refers to UP's response to plaintiff's
17 opposition to UP's statement of undisputed facts filed in support
18 of its motion for partial summary judgment re: special land use
restrictions (Docket #94-2.)

19 ¹² In its motions, UP, through its expert Kenneth Stumpf's
20 declaration, calculates the relevant acreage and percentages of
21 land in these areas. According to UP, the QLG offbase areas
22 comprise about 34,880 acres, or about 68% of the federal lands
23 within the Storrie Fire perimeter; Bucks Lake Wilderness areas
24 comprise about 6,489 acres, or about 13% of the federal lands
25 within the Storrie Fire perimeter; and General Forest areas
26 comprise about 9,261 acres, or about 18% of the federal lands
27 within the Storrie Fire perimeter. (SA-RUF ¶s 15, 16, 18.)
28 Plaintiff objects to these calculations and moves to strike
Stumpf's declaration under Fed. R. Civ. P. 37 for failure to
disclose these calculations in his expert report and/or
deposition. The court need not rule on plaintiff's objections
and motion to strike (Docket #79) since the precise calculations
for these areas of land are not pertinent to resolution of the
legal issues presented by these motions. For purposes of this
motion, plaintiff concedes the above described facts, which are
necessary to determination of the motions. Plaintiff may later
renew, at the appropriate time, its objections to Stumpf's
calculations.

(NR-RAF ¶s 12-17.) The forests' use for recreation and scenic enjoyment was also sorely impacted, plaintiff asserts, including Highway 70 which is designated a "scenic byway" and the Pacific Crest Trail. (NR-RAF ¶ 18.)¹³

Since 1999 and to the present, the Quincy Library Group Act prohibited the Forest Service from selling the timber on the QLG offbase lands. The Act likewise prohibited the Forest Service, following the fire, from conducting a salvage sale of the burned trees located on the QLG offbase lands. (T-RUF ¶s 4, 9.) Had the trees on these lands not been wholly destroyed by the fire, plaintiff could have harvested the trees over time, after the expiration of the Quincy Library Group Act.¹⁴ (T-RUF ¶s 8, 9.) Similarly, no logging or reforestation was allowed in the Bucks Lake Wilderness, at the time of the fire, and no logging or

¹³ UP disputes these facts, arguing primarily that they are "immaterial" to resolution of the motion. The court agrees that it is not necessary to resolve the parties' disputes on these issues in rendering a decision on the instant motions. However, the court recounts plaintiff's position on these issues to provide context to the discussion below regarding plaintiff's claims for reforestation costs and habitat equivalency damages. Ultimately, the merits of plaintiff's contentions will be evaluated by the jury in assessing the amount of damages to award.

¹⁴ The Quincy Library Group Act was enacted in 1998 by Congress following an agreement by a coalition of representatives from the timber industry, fisheries, environmental groups, the federal government and local communities. 16 U.S.C. § 2104, Historical and Statutory Notes. The Act established a pilot project for five years on lands in the Pulmas, Lassen, and Tahoe National Forests to evaluate various resource management practices. The Act prohibited all timber harvesting activities, including timber salvage sales, on areas designated as deferred or offbase. 16 U.S.C. § 2104, Historical and Statutory Notes (c)(4). At the time of the fire, the Act was scheduled to expire in 2004, but in 2003, Congress extended the Act through 2009 and thereafter on December 26, 2007, Congress extended the Act to September 30, 2012. (See UP's Req. for Jud. Not., filed Jan. 31, 2008 [Docket #99].)

1 reforestation of the area is permitted today. (SA-RUF ¶s 20,
2 21.) The General Forest areas are lands where commercial logging
3 may occur subject to other legal restrictions, such as
4 environmental assessment requirements. (UP's MSJ re: Areas
5 Subject to Special Land Use Restrictions [Docket #70] at 1 n.3.)
6 Plaintiff contends the Storrie Fire destroyed NFS timber
7 that had a total pre-fire timber value of \$121,916,774. However,
8 plaintiff seeks by its motion a finding that, at a minimum, the
9 pre-fire timber value is \$79,291,175, representing the value
10 plaintiff contends UP's expert conceded was the pre-fire value of
11 the destroyed timber. Defendant disputes that its timber
12 appraisal expert, James Fleming, made such a concession; rather,
13 defendant maintains that Mr. Fleming proposed this figure as a
14 *hypothetical* pre-fire value, calculated as if the trees were on
15 private land and were able to be sold without NFS restrictions.
16 (T-RUF ¶ 2.)

17 As to the NFS timber that was not located on QLG offbase
18 lands, the Forest Service conducted post-fire salvage sales,
19 recovering \$335,616. (T-RUF ¶ 7.) Defendant contends a post-
20 fire salvage sale of the burned timber on the QLG offbase lands,
21 had federal law permitted it, would have generated \$73,592,040.
22 Therefore, defendant claims, if at all, plaintiff incurred only
23 \$5,699,135 in net lost timber value (\$79,291,175 minus
24 \$73,592,040). (T-RUF ¶ 5-6.)¹⁵

25
26 ¹⁵ UP filed certain objections to the evidence submitted
27 by plaintiff in opposition to UP's motions (Docket #92-4). The
28 court does not rule on said objections as the underlying evidence
is not pertinent to resolution of the legal issues presented on
(continued...)

STANDARD

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of the rule is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. See Celotex, 477 U.S. at 323-24. If the moving party does not bear the burden of proof at trial, he or she may discharge his burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there

¹⁵(...continued)
these motions. UP may renew, at the appropriate time, its objections to the subject evidence.

1 is a genuine issue for trial." Anderson v. Liberty Lobby, Inc.,
2 477 U.S. 242, 256 (1986). Genuine factual issues must exist that
3 "can be resolved only by a finder of fact, because they may
4 reasonably be resolved in favor of either party." Id. at 250.

5 In judging evidence at the summary judgment stage, the court
6 does not make credibility determinations or weigh conflicting
7 evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809
8 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus.
9 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The
10 evidence presented by the parties must be admissible. Fed. R.
11 Civ. P. 56(e). Conclusory, speculative testimony in affidavits
12 and moving papers is insufficient to raise genuine issues of fact
13 and defeat summary judgment. See Falls Riverway Realty, Inc. v.
14 City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985); Thornhill
15 Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

16 ANALYSIS

17 California law applies on plaintiff's damages claims in this
18 action (except on plaintiff's claim for interest and penalties
19 under 31 U.S.C. § 3717). United States v. California, 655 F.2d
20 914, 917-20 (9th Cir. 1980) (in forest fire recovery cases
21 brought by the United States, federal courts will "borrow[] state
22 law to fashion the federal rule of decision"). As this court has
23 held: "It is appropriate for the United States to rely upon the
24 provisions of the [California] Health and Safety Code [§§ 13007-
25 13009.1] as a basis for a claim to recover damages to National
26 Forest land caused by a fire and/or to recover associated fire
27 suppression and investigation costs." United States v. Southern
28 Cal. Edison Co., 413 F. Supp. 2d 1101, 1129 (E.D. Cal. 2006).

1 **1. Diminution in Market Value**

2 UP contends that under California law the measure of damage
3 for negligent injury to real property is the difference between
4 the value of the property before and after the injury. This
5 measure, UP asserts, is the "favored, usual measure" of injury to
6 timber by fire because it offers several advantages over
7 alternate yardsticks, including a comparatively easy and certain
8 assessment of pre- and post-fire market value, the consideration
9 of the fire's benefits, and avoidance of inappropriate double
10 recovery for overlapping elements of damage. See Santa Barbara
11 Pistachio Ranch v. Chowchilla Water Dist., 88 Cal. App. 4th 439,
12 446 (2001); Heninger v. Dunn, 101 Cal. App. 3d 858, 862 (1980);
13 Mozzetti v. City of Brisbane, 67 Cal. App. 3d 565, 576 (1977).

14 UP is correct that courts have recognized that "generally"
15 the measure of damages for the destruction of or injury to
16 productive trees is "the difference in the value of the land
17 before and after the destruction or injury." See e.g., Santa
18 Barbara Pistachio Ranch, 88 Cal. App. 4th at 447; Heninger, 101
19 Cal. App. 3d at 861-62. However, UP fails to acknowledge that
20 these same courts also emphasize that:

21 There is no fixed rule for the measure of tort damages
22 under Civil Code section 3333. The measure that most
23 appropriately compensates the injured party for the loss
24 sustained should be adopted.

25 Santa Barbara Pistachio Ranch, 88 Cal. App. 4th at 446-47; see
26 also Heninger, 101 Cal. App. 3d at 862 (recognizing that
27 "[d]iminution in market value . . . is not an absolute
28 limitation; several other theories are available to fix
 appropriate compensation for the plaintiff's loss"); Mozzetti, 67

1 Cal. App. 3d at 576 (recognizing there is no fixed, inflexible
2 rule for determining the measure of damages for injury to or
3 destruction of property and whatever formula is most appropriate
4 in a particular case will be adopted). Indeed, the general
5 measure of tort damages under California law is broadly defined;
6 California Civil Code section 3333 provides: "For the breach of
7 an obligation not arising from contract, the measure of damages,
8 except where otherwise expressly provided by this code, is the
9 amount which will compensate for all the detriment proximately
10 caused thereby, whether it could have been anticipated or not."

11 Thus, as the injured party here, plaintiff is entitled to
12 *full* compensation for *all* of its damages. While the cases cited
13 by UP set forth general principles that may be applied if
14 appropriate to the factual circumstances of the case, they do not
15 dictate an inflexible, formulaic approach, as UP urges. Rather,
16 this court must consider, as many courts have, the unique
17 character of the land at issue. "Where the article or thing is
18 so unusual in character that market value cannot be predicated on
19 it, its value, or plaintiff's damages, must be ascertained in
20 some other rational way" Zvolanek v. Bodger Seeds, 5
21 Cal. App. 2d 106, 109 (1935); see also State of Ohio v. U.S.
22 Dep't of the Interior, 880 F.2d 432, 463 (D.C. Cir. 1989)
23 ("[N]atural resources have values that are not fully captured by
24 the market system.").

25 UP cites to a number of cases addressing property damages to
26 residential or commercial real property with an available market
27 value and stating that a plaintiff is generally allowed to
28 recover either the cost of repair or the diminution in market

1 value. See e.g. Safeco Ins. Co. of Am. v. J&D Painting, 17 Cal.
2 App. 4th 1199 (1993); Ferraro v. So. Cal. Gas Co., 102 Cal. App.
3 3d 33 (1980); Mozzetti, 67 Cal. App. 3d at 576. These cases,
4 however, have little or no relevance to the present case, in
5 which UP burned thousands of acres of protected government forest
6 lands for which no real estate market value exists. Moreover, UP
7 ignores applicable California and Ninth Circuit law setting out
8 the appropriate measure of damages for fire injuries to *forest*
9 *lands*.

10 **2. Recoverable Damages**

11 In McKay v. State of Cal., 8 Cal. App. 4th 937, 940 (1992),
12 the California court of appeal held that in light of the broad
13 statutory language of Health and Safety Code section 13007¹⁶ and
14 "its history of liberal construction," the statute places "no
15 restrictions on the type of property damage that is compensable"
16 thereunder. Thus, courts have not read Section 13007 as limiting
17 a plaintiff's recovery to property damage only. See Robinson v.
18 U.S., 175 F. Supp. 2d 1215, 1221 (E.D. Cal. 2001). Resource
19 damages, including timber damages, rehabilitation and restoration
20 costs, and environmental and habitat damages are recoverable as
21 separate injuries. McKay, 8 Cal. App. 4th at 940 (affirming
22 judgment for both lost market value for burned land and lost
23 profits during recovery period); People v. Southern Pacific Co.,
24 139 Cal. App. 3d 627, 635 (1983) (affirming damages for the

25
26 ¹⁶ Section 13007 provides: "Any person who personally or
27 through another willfully, negligently, or in violation of law,
28 sets fire to, allows fire to be set to, or allows a fire kindled
or attended by him to escape to, the property of another, whether
privately or publicly owned, is liable to the owner of such
property for any damages to the property caused by the fire."

1 separate injuries of destruction of trees used for timber, damage
2 to the soil, replanting costs, and expenses incurred in salvage
3 operations); Feather River Lumber Co. v. U.S., 30 F.2d 642, 644
4 (9th Cir. 1929) (measure of damages for destruction of
5 merchantable timber was value of such trees, and measure of
6 damages for young growth forest was cost of restoring land to its
7 condition prior to fire).

8 More specifically, in Southern Pacific Co., the owners of
9 timberland damaged by fire filed suit against a railroad
10 company, alleging that the fire had started on or escaped from a
11 railroad right-of-way as a result of the railroad's negligence.
12 139 Cal. App. 3d at 631. On appeal, the railroad complained that
13 the jury instructions improperly allowed the jury to award
14 damages for *both* the fair market value of the timber destroyed
15 *and* the cost of restoration of the property through
16 reforestation. Id. at 635. In finding no error, the court held
17 that the property owners were entitled to damages for the
18 separate injuries of destruction of trees used for timber, damage
19 to the soil, replanting costs, and expenses incurred in salvage
20 operations. Id. Distinguishing Heninger, heavily relied upon by
21 UP herein, the court in Southern Pacific Co. wrote:

22 [In Heninger] there was only one element of damage-
23 the loss of trees and vegetation-and the trial court
24 had denied damages because it found that the defendant's
25 conduct (bulldozing a road through plaintiff's property)
26 resulted in a net increase in the market value of the
27 property. The Court of Appeal, emphasizing the 'broad
28 mandate' of Civil Code section 3333 to compensate for
'all the detriment proximately caused' by the tortious
injury to property, held that the trial court could
have awarded either the value of the trees and undergrowth,
as timber or for their aesthetic qualities, or the cost
of restoration, if reasonable and if the plaintiffs had
'personal reasons' for restoration.

1 Here, there is no question but that the fire damaged
2 plaintiffs' property and reduced its value. Moreover,
3 it did so not only through destruction of trees used
4 for timber, but through damage to the soil. In addition,
5 respondents were required by law to replant to a certain
6 minimum density, and they incurred expenses in their
7 salvage operation. These are separate injuries.

8 Id. at 635. Such is also the case here.

9 Likewise, in McKay, the appellate court specifically
10 rejected the contention that the owners of agricultural property
11 who suffered damage after a controlled-burn fire spread to their
12 property were entitled to recover damages only for the reduction
13 in the value of their real property. 8 Cal. App. 4th at 939.
14 Recognizing Section 13007's history of liberal construction, the
15 court held that the statute permits recovery for any damages to
16 the property and places no restriction on the type of property
17 damage that is compensable. Id. at 939-40. The court therefore
18 concluded that lost profits from a business connected to the
19 property damaged by fire were compensable. Id. at 940.
20 Similarly, in Feather River, the Ninth Circuit held that the
21 trial court properly admitted evidence showing what was required
22 to make the government whole following a fire to public lands,
23 which included the cost of restoring the land to its pre-fire
24 condition.

25 In sum, the case law is clear that there is not one
26 particular method for ascertaining plaintiff's damages in this
27 case. There are many separate, identifiable categories of
28 damages potentially awardable to fully compensate plaintiff for
its injuries caused by defendant's negligence. Plaintiff may
argue these different damages to the jury, and the court finds

1 that diminution in market value is not a reasonable method of
2 ascertaining the damages to the unique land at issue. Courts
3 have recognized in similar cases, that to fully compensate the
4 government for injury to such protected forest lands, it must be
5 permitted to recover for its separate and identifiable injuries,
6 including the value of the NFS timber destroyed by the fire,
7 reforestation costs due to damage to the soil and for young
8 growth, pre-merchantable trees destroyed by the fire and damages
9 for loss of habitat and other loss of use of the burned NFS land
10 during the period of regrowth.

11 The court turns next to these specific categories of damages
12 and UP's particular challenges thereto.

13 **3. Timber Damages**

14 As a preliminary issue, plaintiff requests that the court
15 enter partial summary judgment in its favor, finding that a
16 minimum, the NFS timber destroyed as a result of the Storrie Fire
17 had a pre-fire timber value of at least \$79,291,175. Plaintiff
18 makes this argument solely on the basis of an alleged
19 "concession" made by UP's timber appraisal expert, Mr. Fleming.
20 UP disputes that any such concession was made by Mr. Fleming
21 (T-RUF ¶s 5, 6, T-ADF ¶ 7),¹⁷ and as such, the court cannot make
22 the requested finding in plaintiff's favor. The amount of
23 plaintiff's timber damages is a disputed issue of fact which the
24 jury must resolve at trial.

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27 ¹⁷ "T-ADF" refers to UP's additional facts filed in
28 opposition to plaintiff's motion for partial summary judgment re:
timber damages (Docket #82).

1 However, the court can determine on summary judgment whether
2 plaintiff is entitled to seek such damages, and if it is, whether
3 defendant is entitled to any offset thereof. These are issues of
4 law.

5 As to the first issue, defendant contends that plaintiff may
6 not recover damages for the value of the trees located on the QLG
7 offbase and Bucks Lake Wilderness lands because commercial
8 logging of those lands is not permitted by law. Such logging is
9 prohibited on the QLG offbase lands through September 2012, and
10 is prohibited indefinitely on the Wilderness lands. Under the
11 case law discussed above, however, plaintiff is entitled to
12 recover all of its timber damages for mature timber destroyed
13 because of the Storrie Fire, regardless of whether that timber
14 was located on General Forest lands, on QLG offbase lands or on
15 the Bucks Lake Wilderness lands. See Southern Pacific Co., 139
16 Cal. App. 3d at 635; Feather River, 30 F.2d at 644.

17 Contrary to defendant's argument, said damages to the QLG
18 offbase lands are not speculative. When the Storrie Fire
19 occurred in August 2000, the Quincy Library Group Act was set to
20 expire in 2004. Had the fire not destroyed the trees within the
21 deferred and offbase areas, the trees would have been
22 commercially available for harvesting within a few years, and
23 plaintiff could have recovered their timber market value. See
24 Safeco Ins. Co. v. J&D Painting, 17 Cal. App. 4th 1199, 1202
25 (1993) (recognizing that property damage is properly calculated
26 based on the condition of the property *at the time of the*
27 *injury*). Instead, as a result of the damage caused by the
28 Storrie Fire and the subsequent decay of the burned trees, these

1 trees are dead or dying and no longer have any viable timber
2 value. (T-RUF ¶ 8.) In other words, but for the Storrie Fire's
3 destruction of the trees, the trees' timber value would have
4 remained "banked" for future use, and the Forest Service
5 potentially could have realized the trees' green timber value by
6 harvesting the trees over time in future years, after the
7 expiration of the Act. That the Act has subsequently, post-fire,
8 been extended is of no consequence to the issue presented here
9 because at the relevant time in 2000, the Act had a definite
10 expiration date.

11 UP's reliance on United States v. Denver & Rio Grande W. RR
12 Co., 547 F.2d 1101 (10th Cir. 1977), to argue that in areas where
13 commercial logging is not allowed the reasonable cost of
14 reforestation is the proper measure of damages, is misplaced.
15 Denver & Rio Grande involved 55 acres of "non-commercial
16 forest land" consisting of "nearly precipitous canyon walls,"
17 with 50% of the burned surface consisting of "rock outcroppings,"
18 and for which no timber-cutting or grazing permits had ever
19 been issued. Id. at 1104-05. There was no known market value
20 for the burned tract either before or after the fire. Id. at
21 1105. Rather than supporting its claim for 55 acres of timber
22 damages with expert testimony, the government instead relied on a
23 generic Bureau of Land Management formula. Id. at 1105. Under
24 such circumstances, the court found that the appropriate measure
25 of damages was the reasonable cost of restoration of the land.

26 In contrast, here, plaintiff's timber damages of
27 \$121,916,774 are supported by detailed expert analysis of actual
28

1 timber values. (SA-RAF ¶ 10.)¹⁸ For example, plaintiff's
2 experts did not include immature trees without commercial value
3 in their timber damages assessment; instead, plaintiff seeks
4 reforestation costs for the destruction of these trees. It is
5 also undisputed that less than 1% of the NFS lands within the
6 Storrie Fire perimeter consisted of non-forest land not suitable
7 for timber production. Such lands were not, by definition,
8 included in plaintiff's request for timber damages. (SA-RAF ¶
9 11.) Plaintiff also deducted from its estimated timber damages
10 any monies recovered in its post-fire salvage sales on non-QLG
11 offbase and Wilderness lands (some \$335,616).

12 Additionally, the illogic of UP's argument is starkly
13 revealed when one considers, in particular, the Bucks Lake
14 Wilderness area. UP contends that since this area may never be
15 logged or reforested, plaintiff should not be awarded damages
16 based on pre-fire timber valuation or reforestation. Rather, UP
17 contends that plaintiff may only recover damages based on injury
18 to this area if it can present "competent evidence of a proper
19 valuation" that is "not speculative, is logically supported, and
20 consistent with law." (UP's MSJ re: Areas Subject to Special
21 Land Use Restrictions [Docket #70] at 12 n. 19.) However,
22 according to UP, plaintiff's experts have not presented such
23 evidence. (Id.) Essentially, UP contends that plaintiff has no
24 quantifiable recovery for the destruction of this area--under
25 UP's view, UP effectively had a free pass to burn this land.

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27 ¹⁸ "SA-RAF" refers to UP's response to plaintiff's
28 additional facts in opposition to UP's motion for partial summary
judgment re: natural resource damages for areas subject to
special land use restrictions (Docket #94-3).

UP's argument wholly ignores that the Wilderness areas are national treasures created by Congress "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness," and they are to "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness." 16 U.S.C. § 1131(a). "Congress thereby expressed support for the principle that wilderness has value to society that requires conservation and preservation." The Wilderness Society v. United States Fish & Wildlife Serv., 353 F.3d 1051, 1055 (9th Cir. 2003) (en banc). In such circumstances, plaintiff may recover damages for the timber burned in the Wilderness areas. Courts have recognized that:

[I]f [the] restoration of the land to a reasonable approximation of its former condition is impossible or impracticable, the landowner may recover the value of the trees or shrubbery, *either as timber or for their aesthetic qualities*, again without regard to the diminution in the value of the land.

Hassoldt v. Patrick Media Group, Inc., 84 Cal. App. 4th 153, 168 (2000) (emphasis added) (quoting Heninger, 101 Cal. App. 3d at 865 (1980)).¹⁹

¹⁹ For the same reasons, UP's argument regarding the "Roadless Rule," a United States Forest Service regulation generally prohibiting logging in inventoried roadless areas, some of which are within the QLG offbase lands, is also unavailing. See 36 C.F.R. § 294.10 *et seq.* While the Roadless Rule may preclude logging within some of the QLG offbase lands beyond the expiration of the Quincy Library Group Act, such prohibition does not prevent plaintiff from seeking timber damages for the same reasons plaintiff may recover damages based on injury to the Bucks Lake Wilderness area. Moreover, the court notes that the Roadless Rule has been subjected to voluminous litigation, all of which render uncertain its present viability and applicability to this case in the first instance. (See Pl.'s Reply on MSJ re: (continued...))

1 Destroyed timber values are a relevant means to capture at
2 least part of the lost value of the burned lands because there is
3 no available real property market value by which to determine the
4 pre- and post-fire value of thousands of acres of NFS lands that
5 may not be sold and are held in trust for the benefit of current
6 and future generations of Americans. Congress has elected to
7 preserve certain NFS lands in an unharvested state, either
8 temporarily as in the case of QLG offbase lands, or more
9 permanently as with the Wilderness areas or areas subject to the
10 Roadless Rule. These decisions reflect federal policy that such
11 NFS lands have a higher public worth than simply the present
12 value of their timber. See e.g. 16 U.S.C. §§ 475, 528 (stating
13 Congress' policy that NFS lands be administered for a variety of
14 purposes including outdoor recreation, range, watershed,
15 wildlife, and fish purposes, in addition to furnishing a
16 continuous supply of timber); 16 U.S.C. § 2104 (detailing the
17 wide range of purposes for which the Forest Service protects
18 National Forests); 16 U.S.C. § 1131(a) (purpose of Wilderness
19 designation is to secure for future generations an enduring
20 resource of wilderness).

21 Accordingly, the court finds plaintiff is entitled to
22 recover its timber damages for NFS timber destroyed by the
23 Storrie Fire, including for NFS timber located on the QLG offbase
24 lands and lands within the Bucks Lake Wilderness.

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28 ¹⁹(...continued)
Timber Damages [Docket #91] at 7 n. 3.)

1 UP asserts that if such damages are permitted by the court,
2 it should be permitted to argue to the jury that plaintiff's
3 damages calculation is inflated, as it does not account for the
4 full administrative costs that the government would have incurred
5 in marketing unburnt timber at the prices it claims, including
6 environmental assessment costs and road building costs. (NR-RUF
7 ¶s 8-10.) UP is incorrect. The harm in this case was caused by
8 UP's now admitted negligence (see supra n. 8); negligence which
9 essentially created a "forced sale" by plaintiff of the trees,
10 and thus, deduction for so-called "administrative" costs is not
11 appropriate. See Roark v. Musgrave, 41 Ill. App. 3d 1008, 1014
12 (Ill. App. Ct. 1976) ("[T]o limit his recovery to the commercial
13 value of the timber taken would have been to reduce the function
14 of the trial court to that of supervisor of a forced sale,
15 against the will of the plaintiff and without regard to the
16 substantial injury done to the land."). Therefore, to compensate
17 plaintiff for the harm to the trees as a result of UP's
18 negligence, damages must be awarded for all of the trees that
19 were killed or damaged by the Storrie Fire, and not then reduced
20 by fictitious, unrealized income from a hypothetical sale of the
21 timber. Defendant will not be permitted to ask the jury to make
22 these deductions to plaintiff's claimed timber damages.
23 Nevertheless, the court notes that plaintiff has indicated that
24 its damage appraisers deducted the actual anticipated logging
25 costs from the value of the timber claimed. (Pl.'s Opp'n to UP's
26 MSJ re: Natural Resource Damages [Docket #76] at 19 n. 10.)

27 In a similar argument, defendant contends it is entitled to
28 an offset of plaintiff's timber damages based upon the amount UP

1 contends the Forest Service could have obtained in a theoretical
2 post-fire salvage sale of the timber on the QLG offbase lands.
3 Specifically, defendant seeks an offset of \$73,592,040, claiming
4 that the Forest Service could have recovered this amount in such
5 a sale. Plaintiff contends that an offset is not permitted
6 because a salvage sale is barred by the Quincy Library Group Act
7 and would have been illegal thereunder. UP agrees that the Act
8 prohibited a post-fire salvage sale, but argues that it likewise
9 precluded a sale of the timber pre-fire, and thus, if the
10 government is permitted damages based in part on the *theoretical*
11 pre-fire, sale value of the timber on these lands, UP should also
12 receive a corresponding offset to those damages based on a
13 theoretical post-fire salvage sale.

14 UP's argument misapprehends the relevant inquiry. The Ninth
15 Circuit has specifically held salvage value is a question of
16 mitigation *after* actual damages have been ascertained and then
17 only for amounts that were realized or *could have been* realized.
18 United States v. Hult, 319 F.2d 47, 48 (9th Cir. 1963). In Hult,
19 the United States brought an action for damages for trespass on
20 timber lands and appealed an unsatisfactory judgment. The Ninth
21 Circuit, applying Oregon law which provided for double damages
22 for trespass, held:

23 The amount of the judgment shall be determined by first
24 doubling the amount of actual damages suffered as the
25 result of the trespass, and deducting from such doubled
26 damages, *in mitigation thereof*, allowance for such salvage
27 as the United States, by its own diligence, *realized or*
28 *could have realized*. The fact, *if it is a fact*, that the
United States could have salvaged all or most of the cut
timber at a value equaling or exceeding the stumpage value
of such timber, is without relevance in determining the
amount of actual damages resulting from the trespass, *but*
is to be considered only with regard to the question of

1 mitigation after actual damages have been ascertained
2 and doubled.

3 Id. (Emphasis added.)

4 Thus, there is no "corresponding" rule, as suggested by UP,
5 since the assessment of plaintiff's actual damages, and the rules
6 governing that issue, are a separate inquiry from the assessment
7 of plaintiff's duty to mitigate its damages after the commission
8 of the tort. Under the doctrine of avoidable consequences (or
9 mitigation of damages), the person injured by another's wrongful
10 conduct may not recover continuing damages "that the injured
11 person could have avoided by reasonable effort or expenditure."
12 State Dep't of Health Servs. v. Sup. Ct., 31 Cal. 4th 1026, 1043
13 (2003). In Hult, the court made clear that allowance for salvage
14 value is permitted only for monies the government actually
15 realized or could have realized. Thus, UP is entitled to an
16 offset of damages only for the salvage value realized by
17 plaintiff for its salvage sale with respect to timber not located
18 on the QLG offbase lands (plaintiff concedes on the motion a
19 salvage value for this timber of \$335,616). With respect to the
20 QLG offbase lands, however, plaintiff *could not* realize a salvage
21 value for that timber because such a sale was prohibited by law.
22 16 U.S.C. § 2104, Historical and Statutory Notes, (c)(4). UP is
23 accordingly not entitled to an offset of these damages based on a
24 theoretical post-fire salvage sale of the burned timber on the
25 QLG offbase lands.²⁰

26 ²⁰ Defendant seeks this offset via its affirmative defense
27 of failure to mitigate damages. At times in its papers,
28 plaintiff asks the court to "strike" this defense. UP opposed
(continued...)

1 Plaintiff's citation to People v. New York Cent. & H.R.R.
2 Co., 213 N.Y. 136 (1914), to argue the contrary, is inapposite.
3 Not only is the decision of no precedential value, it is wholly
4 distinguishable on the facts. There, the initial appellate court
5 affirmed the trial court's award of damages based upon the value
6 of the green trees before the fire, and without any reduction for
7 salvage value because the trees could not be salvage logged. 161
8 A.D. 322, 326-27 (N.Y. 1914). On appeal, the New York Court of
9 Appeals (New York's highest court) reversed. 213 N.Y. 136
10 (1914). However, it expressly did so because the parties
11 *stipulated* that the measure of damages for negligently causing
12 the burning of a state forest preserve was the difference in
13 market value of the forest lands before and after the burning.
14 Id. at 139-40. Moreover, the state in that case had not set up a
15 valuation method for such damages. Id. The court held that the
16 proper measure of damages as stipulated by the parties was not
17 changed by the constitutional inhibition on the sale of the land.
18 Id.

19 Unlike New York Cent., here, there is no stipulation as to
20 the proper measure of damages and California law specifically
21 provides for the recovery of separate categories of damages. See
22 e.g. Southern Pacific Co., 139 Cal. App. 3d at 627. Moreover,
23

24 ²⁰(...continued)
25 said request, arguing it is procedurally improper to strike a
26 defense on a motion for summary judgment; plaintiff's motion,
27 despite the occasional improper reference to a motion to strike,
28 is correctly treated as a motion for partial summary judgment as
to this defense; such a motion is proper under Fed. R. Civ. P.
56, as plaintiff seeks a finding that as a matter of law, UP
cannot assert its defense on this legal ground.

1 Ninth Circuit law provides for the offset of salvage values only
2 that were realized or could have been realized. Hult, 319 F.2d
3 at 48.

4 Therefore, plaintiff's motion as to UP's affirmative defense
5 of failure to mitigate damages based on a theoretical post-fire
6 salvage sale of the timber on the QLG offbase lands is granted,
7 as the defense is not maintainable on this ground as a matter of
8 law.²¹ As such, the court likewise grants plaintiff's motion to
9 exclude at trial Mr. Fleming's testimony directed to this issue.
10 Because UP's defense on this theory is precluded, Mr. Fleming's
11 testimony concerning a purported offset of \$73 million, from a
12 theoretical post-fire salvage sale that was never conducted and
13 for which there was and is no legal basis, must be precluded as
14 well.²²

18 ²¹ To the extent UP has any other bases to press its
19 affirmative defense of failure to mitigate damages against
20 plaintiff, the court makes no findings therein. The court's
findings are limited only to the issues raised by the parties on
the instant motions.

21 ²² To the extent the parties have made other objections
22 and motions to strike each other's experts' testimony in this
23 case, including Mr. Fleming and plaintiff's expert, David Stone,
the court does not reach those issues. Challenges to an expert's
24 methodology and reliability are properly considered at the time
of trial by motions in limine. (Pre-trial Sch. Order, filed Oct.
26, 2006); E.D. Cal. L.R. 16-285(a)(3). Challenges to an
25 expert's substantive opinions are the proper subject of cross-
examination; such issues are not appropriate for resolution on
26 summary judgment. For example, plaintiff's objections to alleged
"deficiencies" in Mr. Fleming's opinions on the estimated
27 reforestation costs, (see plaintiff's opposition to UP's motion
for summary judgment re: natural resource damages [Docket #76] at
28 15-16), are the proper subjects of either a motion in limine or
cross-examination.

1 **4. Reforestation Costs**

2 As set forth above, to "fully" compensate plaintiff for
3 defendant's negligent conduct, plaintiff may seek damages for
4 injuries other than to the timber, including harm to the soil,
5 destruction of young growth, pre-merchantable timber, and
6 destruction of wildlife, habitat, recreation use, views, etc.
7 See e.g. Southern Pacific Co., 139 Cal. App. 3d at 635; Feather
8 River, 30 F.2d at 644; Spokane Int'l RR v. U.S., 72 F.3d 440, 443
9 (9th Cir. 1934). The latter injuries are discussed below
10 regarding plaintiff's request for habitat equivalency damages and
11 defendant's challenges thereto. With respect to plaintiff's
12 claimed reforestation costs, plaintiff proffers evidence of the
13 fire's severe impact on the soil itself and the destruction of
14 pre-merchantable timber caused by the fire (NR-RAF ¶s 8, 9, 10),
15 damages which are separate and apart from the injury to the
16 merchantable trees. The damage to the soil, according to
17 plaintiff, may take hundreds of years to rebuild, if ever.
18 (NR-RAF ¶ 11.) Plaintiff calculates its expected future costs,
19 if all the areas in which trees were killed were replanted, at
20 \$32,608,739, or if a more conservative approach is taken and
21 initial efforts are directed only to areas that suffered moderate
22 and high intensity burns, at \$23,916,190. (NR-RUF ¶ 3.)²³ These
23 damages are legally recoverable, for the separate injury to the
24 soil and pre-merchantable timber, under the authorities discussed
25 above.

26
27 ²³ Because federal law precludes the Forest Service from
28 undertaking reforestation efforts on Wilderness lands, plaintiff
did not include any Wilderness lands in its calculations of
reforestation damages.

1 Nonetheless, UP argues plaintiff's reforestation costs are
2 unreasonable and too speculative to form the basis of a damages
3 award. As to the first issue, UP is correct that only reasonable
4 reforestation costs are appropriate. Heninger, 101 Cal. App. 3d
5 at 865. "Proposed replacement costs may be unreasonable or
6 excessive in relation to the damage inflicted on the land . . .
7 or the value prior to trespass." Id. However, UP's argument
8 fails as this court has determined that diminution in market
9 value is not the proper measure of damages in this case. Rather,
10 here, plaintiff may seek a damages award, which includes an
11 alleged \$121 million in damages to the destroyed timber. Because
12 plaintiff may argue these damages to the jury, the court cannot
13 find on summary judgment, that as a matter of law, plaintiff's
14 alleged reforestation costs, of between \$24 and \$33 million, are
15 excessive in relation to the alleged damage inflicted on the land
16 at issue.

17 UP alternatively contends that plaintiff's reforestation
18 damages should be precluded as too speculative. Specifically, UP
19 asserts plaintiff cannot show it is "highly probable" it will
20 actually replant the areas of the forest for which it seeks
21 reforestation costs. Yet, UP acknowledges in the seven years
22 since the fire, plaintiff has replanted approximately 300 acres
23 of forest at a cost of \$254,000. (NR-RUF ¶ 29-31.) Further,
24 plaintiff submits evidence of its detailed reforestation plans
25 and the costs therefor. (NR-RUF ¶ 3.)²⁴ Based on plaintiff's

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27 ²⁴ Plaintiff explains that it has not replanted more of
28 the subject area to date because there has not been a budget to
(continued...)

1 proffered evidence, the court cannot find, as a matter of law,
2 that these damages are too speculative.

3 Finally, the court notes that contrary to the cases relied
4 upon by UP, wherein the restoration costs involved the
5 replacement of destroyed trees with "identical or substantially
6 similar trees," and the "achievement of a reasonable
7 approximation of the land's former condition,"²⁵ here, much of
8 the devastated areas involved old growth forests, designated
9 Wilderness and trees that were hundreds of years old. The
10 reforestation in this case will involve only seedlings. Thus,
11 the habitat equivalency damages, sought by plaintiff, seek to
12 quantify the harm to the habitat and environment and the lengthy
13 process it will take to rebuild the forests to their former
14 condition.

15 **5. Habitat Equivalency Damages**

16 Finally, UP requests partial summary judgment on plaintiff's
17 claim for habitat equivalency damages, arguing such damages are
18 duplicative and unauthorized. As previously discussed, plaintiff
19 is entitled to seek full compensation for the separate and
20 identifiable injuries it has suffered. Cal. Civ. Code § 3333;
21 See e.g. Southern Pacific Co., 139 Cal. App. 3d at 635 (affirming
22 damages for separate injuries from forest fire).

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25 ²⁴(...continued)
26 accomplish that goal. (Pl.'s Opp'n to UP's MSJ re: Natural
27 Resource Damages [Docket #76] at 21-22.)

28 ²⁵ (UP's MSJ re: Natural Resource Damages [Docket #61] at
10:20-25, citing Heninger, 101 Cal. App. 3d at 865.)

1 Plaintiff proffers evidence that habitat equivalency damages
2 provide compensation for loss of the non-timber forest services
3 that resulted from the fire.²⁶ These services include
4 aesthetic/scenic use, wildlife habitat, and recreational use.
5 (HE-RUF ¶ 1.)²⁷ Specifically, plaintiff's experts estimate the
6 fire burned more than 1,600 acres of spotted owl habitat, 12,000
7 acres of carnivore habitat, 9,000 acres of Old Growth forests
8 (impacting bald eagles, goshawks, and pine martens), and impacted
9 amphibians and fish by silt run-offs into streams. The forest's
10 use for scenic and recreational enjoyment was also impacted,
11 particularly along Highway 70, a "scenic byway," and the Pacific
12 Crest Trail. (NR-RAF ¶s 12-17; NR-RAF ¶ 18.) Plaintiff
13 estimates the damage to wildlife habitat and public enjoyment of
14 the forest is \$13,236,000. (HE-RUF ¶ 11.) These habitat
15 equivalency damages are distinct from both the timber damages for
16 the timber destroyed as a result of the fire and the
17 reforestation damages for the costs plaintiff will incur in
18 replanting areas of the forest damaged by the fire.

19 UP also contends there is no federal or California statute
20 authorizing the award of habitat equivalency damages.

21
22 ²⁶ Plaintiff does not agree with the characterization of
23 these damages as "habitat equivalency *damages*." Plaintiff
24 contends "habitat equivalency analysis" is the method employed by
25 its experts of calculating a portion of plaintiff's damages, not
26 a separate category of damages. At core, however, plaintiff
seeks damages for injuries that are distinct from loss of timber
and reforestation costs. The label used to characterize these
damages is of no consequence.

27 ²⁷ "HE-RUF" refers to plaintiff's response to UP's
28 statement of undisputed facts filed in support of its motion for
partial summary judgment re: habitat equivalency damages (Docket
#77-1).

1 Specifically, UP points to federal statutes that expressly allow
2 for these types of damages and contends that no such federal
3 legislation is applicable to this case. See, e.g., Park System
4 Resources Protection Act, 16 U.S.C. § 19jj(b)(1)(A)-(B); National
5 Marine Sanctuaries Act, 16 U.S.C. § 1432(6)(A)(I)-(ii); Oil
6 Pollution Act, 33 U.S. C. § 2706(d)(1)(A)-(C); Comprehensive
7 Environmental Response Compensation and Liability Act, 42 U.S.C.
8 § 9607(a)(4)(c). In sum, UP asserts that because there is no
9 express authorization for habitat equivalency damages, plaintiff
10 is precluded from seeking such damages.


11 As UP acknowledges, however, a plaintiff suing for
12 negligence is entitled to "the amount which will compensate [it]
13 for all the detriment proximately caused [by the defendant],
14 whether [the harm] could have been anticipated or not." Cal.
15 Civ. Code § 3333; see also Cal. Health & Safety Code § 13007
16 (permitting recovery for "any damages to property caused by the
17 fire") (emphasis added); McKay, 8 Cal. App. 4th at 940 (affirming
18 damages for lost market value of burned land and lost profits
19 during recovery period). Moreover, none of the statutes cited by
20 UP *precludes* plaintiff's recovery of habitat equivalency damages.
21 Absent a statutory prohibition, plaintiff is permitted to seek
22 full compensation for losses suffered as a result of the fire,
23 including habitat equivalency damages. See, e.g., Southern
24 Pacific Co., 139 Cal. App. 3d at 635.

1 **CONCLUSION**

2 For the foregoing reasons, defendant's motions (Docket
3 #s 59, 68 and 70) are DENIED and plaintiff's motion (Docket #58)
4 is GRANTED in part and DENIED in part.²⁸

5 IT IS SO ORDERED.

6 DATED: February 13, 2008

7 
8 FRANK C. DAMRELL, JR.
9 UNITED STATES DISTRICT JUDGE

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27 ²⁸ Additionally, as set forth in footnote 8 supra,
28 plaintiff's motion on liability issues (Docket #64) is GRANTED
pursuant to defendant's Concession of Liability, filed Jan. 31,
2008.